Supreme Court, U.S.
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No. 96-

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

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TSENG FU LIN, d/b/a
ORIENTAL JADE RESTAURANT,

Petitioner

v.

CITY OF GOLDSBORO, FLOYD
McKEEL, Agent, and CHARLES R. SOUTHERLAND,

Respondents

On Petition For A Writ Of Certiorari
To The North Carolina Court of Appeals

****

PETITION FOR WRIT OF CERTIORARI

****

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QUESTIONS PRESENTED

I. WERE THE PETITIONER'S CONSTITUTIONAL RIGHTS VIOLATED WHEN HIS USE OF PROPERTY WAS DENIED, HIS WATER CONNECTION WAS CUT OFF, HIS WATER WORKS WERE SEIZED WITHOUT A WARRANT, HIS LICENSES WERE CONFISCATED WITHOUT CAUSE BY THE CITY OF GOLDSBORO, FLOYD M. McKEEL, AGENT, AND CHARLES R. SOUTHERLAND WITHOUT AFFORDING THE PETITIONER A HEARING? EXCEPTION NO.1 [APP-12]

II. DID THE COURT ERR IN GRANTING THE RESPONDENTS' MOTION FOR SUMMARY JUDGMENT IN INVALIDATING THE CITIZENS'CONSTITUTIONAL RIGHTS, AND THE LAW OF THE UNITED STATES 33 USCS ST. 1251 AND 42 USCS 1983? [APP-12]

REFERENCE OF THIS CASE

Tseng Fu Lin v. City of Goldsboro, et.al, COA 95-657, the N.C. Court of Appeals rendered and filed an opinion on December 19, 1995, requiring a citizen to give up his constitutional protection entirely for Executive Privilege and Immunity. This decision is clearly in contradiction with at least three (3) prior Federal Court of Appeals decisions regarding Executive Privileges and Immunities under USCS Section 1983. The following are submitted as selected cases which are in contradiction:

1. Nelson v. Knox (1958) CA 6 Mich 256 F.2d 312.

2. Gaffiney v. Silk (1973) CA 1 Mass 488 F.2d 1248.

3. Birnbaun v. Trusell (1965) CA 2 N.Y. 347 F.2d 86.

Also please see the following:

1. City of Laudue et.al. v. Margaret P. Gilleo 512 US 129, 36 L. Ed 114 (92-1856).

2. Harlowe v. Fitzgerald (1982) 457 US 800.

3. Youngstown Sheetmetal and Tubing, et.al. v. Sawyer 343 US 579.

The privileges and immunities of the Executive Branch does not necessarily require a citizen to give up his or her constitutional rights. This Court in Harlow v. Fitzgerald, 457 US 800 (1982), ruled in favor of this position.

The ruling in the case at bar by the North Carolina Court of Appeals in upholding the ruling of the lower court arms municiple employees with the power to affect a citizen's livelihood-here the cutting off of water-

anytime they choose. This type of unrestricted activity goes beyond the boundary of the law in 33 USCS Section 1251.

In the instant case, the lower courts invalidated the Constitution and it's Laws, allowing the city employees' judgment to be substituted for the proper agency or agencies opens the door for abuse and the potential sacrifice of the citizen's rights guaranteed by the Equal Protection Clause of the Constitution. This principle; the methods used in enforcing City Ordinances which disregard the rights, integrities, Constitutional guarantees and abandon safeguards for those rights of the citizens; need to be examined and ruled upon by this Court. If this Court does not hear this matter, the reality is that people must live in this great land without the rights to speak

out, to be heard concerning change, to work out whereby they may obey the law and to correct any violations. In his book, The Realm of Law, Albert V. Dicey states at pages 188-195 the following:

"No man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in ordinary legal manner before the ordinary Court of the land."

"...No man is above the law. Every man is subject to the ordinary law of the realm."

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STATEMENT OF FACT

Petitioner, Tseng Fu Lin, has owned and operated a restaurant in Goldsboro, North Carolina, since 1976. The restaurant is located on 5.43 acres, and is bordered by U.S. Highway 117 Bypass, 117 Business, along with others and surrounded by other city properties. The building size is 22,400 square feet, one part for the Oriental Jade Restaurant; the other part leased for operation of a grocery store known as the A&P Building.

Sometime in 1990, the City authorized a jail facility to be installed on nearby property. Because some problems developed in association with the City approval of this site, there were many protests from citizens. On March 11, 1991, the sewer line backed up and grievances were aired in public hearings. The City authority blamed the Petitioner as

the cause of the contaminates which affected users further down stream. Since this cause arose under US 33 USCS Section 1251, the Clean Water Protection Law, Pet tioner requested Federal and State Environmental Administrators to investigate what the core of the problem was with an eye to try to improve the situation. After investigation, federal authorities declined to take any action against the Petitioner because the State environmental agency already determined that the Petitioner had complied with the Law by having a Grade A Report [APP-15].

On March 24, 1993, the city plumbing inspector, Mr. John Hales, certified a letter to Petitioner and ordered him to install a grease trap. At that time, the Petitioner was equipped with many devices approved on the record and the certified letter did not state

clearly which building code section the Petitioner had violated. The Petitioner rushed to North Carolina Building Code Enforcement Agency for help. The agency informed the Petitioner of their decisions not to prosecute the violation under state authority [APP-16].

On July 15, 1993, the restaurant experienced an arson fire which the local fire department put out in time. The Petitioner's property sustained limited damage. After the investigation, the Court convicted offender and the City Building Inspection Department issued a permit to repair. There was no structural construction involved, thus limiting the repairs. All of the operations licenses were to remain in effect, and the Petitioner maintained his good standing with all utility services. By November, 1993, all

the repair work had been completed. After inspections, the property was permitted to be used for the same past use. Several days later, Mr. John Hales came over and started taking action to shut off Petitioner's operations at the restaurant and the vacant grocery store, stating that the Petitioner did not comply with his order in the March 1993 letter. Within a week and more specifically on December 1, 1993, the Petitioner filed a petition for variance with the city manager and the city attorney [APP-18].

On December 7, the Petitioner received from the Respondent, Chief Building Inspector Floyd M. McKeel, a certified letter ordering water and electricity to be cut off.

On December 15, the Petitioner's waterworks, lines, gauge valves and meter regulators were confiscated by Respondent,

City Utilities Director Charles R. Southerland and the City of Goldsboro Police Department. Thus, the property's exclusive rights to use had been taken and the privileges and immunities and other constitutional protection were gone like the dust with the wind. After an injunction against the actions of the Respondents was denied by the Wayne County Superior Court, the Petitioner installed the grease trap as specified. The restaurant's water was back on. The grocery store's water was still off. The Petitioner experienced the loss of water works and the property is under a foreclosure sale which Petitioner contends is the result of the Respondent's actions in not allowing him to operate his business. [APP-23].

STATEMENT OF CASE

The Petitioner filed a Complaint on April 20, 1994, asking for damages, both actual and punitive, from the Respondents under the Constitutional protection and for his utilities to be turned back on under the State licensing authority. A preliminary injunction was denied on May 26, 1994 ... [APP-34]. The Respondents filed a counterclaim on June 27, 1994. The Petitioner filed his reply on July 8, 1994. On November 29, 1994,the Respondents filed a Motion for Summary Judgment and was granted such on January 30, 1995, on the basis of governmental immunities [APP-36].

This cause came before the North Carolina Court of Appeals on December 18, 1995. Its opinion was filed on December 19, 1995, affirming the lower court. In affirming the

trial court, the Court finds that the Petitioner is not entitled to the property interest which has constitutional protection.

The Petitioner filed for discretionary review on January 5, 1996, [APP-36]. A certified copy of the record was filed with the North Carolina Supreme Court [APP-54].

After consideration, the discretionary review was denied on February 8, 1996, and an Order was entered in the North Carolina Court of Appeals on February 22, 1996.

GROUND OF PETITION FOR WRIT OF CERTIORARI

On January 30, 1995, the Superior Court of Wayne County, North Carolina, in granting the Respondent's Summary Judgment finds:

A. Under the doctrine of governmental immunities, the Respondents are entitled to

summary judgment. Thereby, the citizen's claim under the Fifth and Fourteenth Amendments for due process and just compensation protection were denied [APP-1]; and

B. The Court expressed concern for due process of law under the procedures used in this case [APP-1].

In affirming the Trial Court, the North Carolina Court of Appeals' opinion filed on December 19, 1995 finds:

A. A municipal corporation is the owner and title holder of clean water. The corporation shall be able to do what ever it sees fit and is not under any scrutiny under the law and constitution [APP-61];

B. The action in removing the Petitioner's rights to water is within a city's official capacity. To bar the Petitioner's claim is justified since the North Carolina Supreme Court decides who is to be under the jurisdiction of constitutional protection [APP-61].

On February 8, 1996, after consideration, the North Carolina Supreme Court voted to deny discretionary review in Chambers. The Petitioner had submitted a brief within the

time, but said brief was not considered. No voting records and opinions were given. The denial of the Petition was entered in the Court of Appeals on February 22, 1996. Thus, the Petitioner exhausted all his remedies in the State Court system [APP-56].

This Petitioner submits to this Court that:

A. Under color of North Carolina Law, North Carolina is requiring citizens to give up rights to clean water under 33 USCS 1251; protection and rights under 42 USCS, Section 1983, and other constitutionally guaranteed rights under the guise of executive privileges and immunities.

B. The decision of the North Carolina Court of Appeals in COA 95-657 is in conflict with the decisions of three United States Courts of Appeals dealing with municipal

officer's immunities under 42 USCS, Section 1983, and this Court's decisions of many cases which will be examined in Arguments I and II.

VERBATIM QUOTATION OF UNITED STATES CONSTITUTION

ARTICLE I SECTION 8 The Congress shall have power: To regulate commerce with foreign nations and around the several states, and with the Indian tribes;

ARTICLE IV SECTION 2 The citizens of each state shall be entitled to all privileges and immunities of citizens in several states;

ARTICLE VI SECOND SENTENCE This Constitution, and laws of the United States which shall be made in pursuance thereof and all treaties made or which shall be made,

under the authority of the United States, shall be the supreme law of land; and the judges in every state shall be bound thereby, and things in constitution or laws of and state to the contrary not withstanding;

AMENDMENT V No person shall be held to answer for a capital, or other infamous crime, unless on a presentment or indictment of a Grand Jury except in cases arising in the land or naval forces or with militia when in actual service in time of war or public danger; nor shall any person be subject for same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty or property without the due process of

law; nor shall private property be taken for public use without just compensation;

AMENDMENT IX The enumeration in the constitution, of certain rights, shall not be construed to deny or disparage other retain by the people;

AMENDMENT XIV SECTION 1 All persons born or naturalized in the United States, and subject to the jurisdiction, thereof, are citizen of United State and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of United States. Nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection

of the law.

CONGRESSIONAL DECLARATION OF GOALS AND POLICY

33 USCS, 1251 (a) Restoration and maintenance of chemical, physical and biological integrity of nations water; national goals for archivement of objective; (b) Congressional recognition, preservation and protection of primary responsibilities and rights of state; (d) Administration of environmental protection agency to administer 33 USCS, 1251; (g) Authority of state over water.

42 USCS, 1983 Civil action for deprivation of rights every person who, under

color of any statute, ordinance, regulation, custom or usage of any state or territory subjects or cause to be subjected, any citizen of United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and Laws shall be liable to the party injured in an action at law, suit in equity, or other proceedings for redress.

ARGUMENTS

I. THE PETITIONER'S CONSTITUTIONAL RIGHTS WERE VIOLATED WHEN HIS USE OF PROPERTY WAS DENIED WHEN HIS WATER CONNECTION WAS CUT OFF, HIS WATERWORKS WERE SEIZED WITHOUT A WARRANT, HIS PRIVILEGES AND IMMUNITIES WERE CONFISCATED WITHOUT CAUSE BY THE CITY OF GOLDSBORO, FLOYD M. McKEEL, AGENT, AND CHARLES SOUTHERLAND, AGENT, WITHOUT AFFORDING THE PETITIONER A HEARING PRIOR TO SUCH ACTION BEING TAKEN [APP-12].

The water supply is essential for life and property. Therefore, it is a property

right protected in the Ninth Amendment of the United States Constitution. The states hold the ownership and title, although it has granted the right of use to its' citizen on prescribed conditions. In accordance with American Jurisprudence, Volume 78 entitled "Water" in Chapter VIII Section 232, a water right is regarded as property and a vested water right or privilege constitutes property within the meaning and operation of the constitutional guarantees. The position that water rights are under Constitutional Protection is supported in Metropolitan Water District v. United States, 628 F. SUPP 1018 (1985). In the present case, the Petitioner had obtained a grant of water for a commercial venture in February, 1976, under the regulations of the Environmental Health Commission. This category of water for a

commercial venture was without a municiple corporation holding a franchised right. This relationship established a contract which would fall under the commerce clause of the United States Constitution, Article I, Section 8. In New Orleans v. Rivers, 129 L.Ed 525, the Supreme Court has declared monopolies are unconstitutional. Petitioner has paid the water assessment in full when the water problem subject was raised. State and federal agencies were called upon to deal with the cause of the sewer problem and to make a determination of its cause. Even after the investigations, the Petitioner was given a grade "A" sanitation report. The Petitioner was permitted to use the water and sewer system. Therefore, there exists reasons sufficient for the Petitioner to be protected.

American jurisprudence Volume 78, Chapter

IX, Section 69, entitled "Waterworks", states that a municipality in the business of furnishing water to its inhabitants as a private corporation and an ordinance prescribing such regulations has the same force and effect as a by-law of a private corporation whose powers are of like character and conferred for the same purpose. This position has been taken by the high courts of Illinois, Kentucky, New Mexico, Ohio and Virginia. The only restriction upon the power to pass such an ordinance is that it conforms to the laws of the state and are reasonable. The law allows municipalities to furnish water and to make sure that the water is available to its citizens within its boundary. The law even grants municipalities the capacity to invalidate state grant water rights or privileges. However, when a municipality

attempts to invalidate a state license for the use of water before the license expires by use of the violation of another law, such as occupancy, it has been held that that action is not reasonable. Blanchard v. Baker, 8 ME 253. To invalidate the public grant without due process of law is not reasonable and is not legally enforceable. This Court held in Dohang v. Rogers, 281 US 362, 74 L.Ed 904, 50 (1930) 12 and Turpin v. Lemon, 187 US 51 47 L.Ed 70.23, Supreme Court 20 (1902), that when water is cut off and there is a refusal to turn it back on while the Petitioner's license is still in force and no exigencies such as fire or shortage exist, but is used merely to abate an ordinance violation without the limits of constitutional guarantees, then there has been a violation of the Constitution, in particular Article VI, second

sentence. This Court also expressed this view in Dolan v. City of Tigard, 129 L.Ed 2nd 304. With no water or no electricity, Petitioner cannot operate his restaurant. The lease to the grocery store expired, and the property is now in foreclosure. Thus, according to American Jurisprudence, Volume 26, entitled "Eminent Domain", Section 98, the Petitioner was entitled to a due process hearing. Eminent domain is only allows a taking within the guarantees of the Constitution. This Court unanimously ruled so in Lucas v. South Carolina Coastal Council, 505 US 120. Government must afford a due process hearing in eminent domain cases according to United States v. James Daniel Good, el Property, 126 L.Ed 2nd 490-491.

A clean water supply is essential and is protected in the Ninth Amendment of the

Constitution. With the Clean Water Act, authorities must be required to protect it's source and prohibit tampering. A cut-off taken with force, is arbitrary as viewed by this Court in Roberts v. New York, 295 US 264 79 LED 1429, Supreme Court, 689.

The core of the Petitioner's argument is to show to this Court that it is not necessary to require citizens to give up the right to have water upon the discretionary whim of the local authorities of administration upon the pretext of enforcing the law. The right to be heard, to have a lawyer present to present the Petitioner's side and to appeal cannot be circumvented under the Constitutional guarantees. To seize the property, without cause or warrant, is Poison Fruit Tree, as seen in Wong Sun v. United States, 371 US 471 (1963).

II. THE COURT ERRED IN GRANTING THE RESPONDENTS MOTION FOR SUMMARY JUDGMENT IN TAKING THE PETITIONER'S PROPERTY RIGHTS, PRIVILEGES AND IMMUNITIES AND OTHER CONSTITUTIONAL RIGHTS WITHOUT THE FOURTEENTH AMENDMENT DUE PROCESS OF LAW, EQUAL PROTECTION UNDER THE LAW AND THE FIFTH AMENDMENT DUE PROCESS OF LAW AND JUST COMPENSATION [APP-12].

This case came before the Wayne County, North Carolina Superior Court on January 30, 1995. In granting the Respondents Motion for Summary Judgment, the Court found:

a. The actions of the building inspectors issuing a violation order and summarily enforcing the same by cutting off the water supply and refusing to turn back on thus causing losses was not tantamount to a taking which required due process.

b. City government and agents under the doctrine of governmental immunities does not have to afford due process protection to Petitioner.

c. Court had a concern of the right to be heard, but in most cases solved by political process - not by law.

This case went on before North Carolina Court of Appeals on December 18, 1995, without

oral argument. The Court affirmed the trial court's opinion on December 19, 1995. The Court found:

a. The judgment proper in the absence of law and constitution requiring liability.

b. The state holds the water property; the water supply, by the City. Petitioner has no property interest. No due process is required.

And this case went on before the Supreme Court of North Carolina. In conference, after consideration, they denied the Petitioner's Discretionary Review on February 23, 1996. In affirming the trial court, the Court of Appeals made a ruling holding that the Petitioner does not have any property interest and cannot claim due process protection. This ruling is clearly in contradiction with this Court's decision in Oyama v. California, 332 US 633 (1948). This Court declared that every American is entitled to pursue life, liberty,

property and the pursuit of happiness. Dr. Martin Luther King, Jr. once stated "I Have a Dream". So too, Petitioner has a dream to keep the property he had already obtained, to receive and retain the grant from the government, and to be under the protection of the United States Constitution and the law. Petitioner further contends that he is a United States citizen who has paid all his dues. Therefore, he is entitled to have an American Dream.

On January 30, 1995, the Superior Court, in granting the Respondents' Motion for Summary Judgment, made findings in cutting off the Petitioner's water that it was not tantamount to a taking. The Petitioner's contention is that a municipality is required to furnish water, not shut it off. Taking away the Petitioner's water privilege is a

taking. Therefore, the taking should be done under Constitutional mandates. In the Conclusion of Law, under (c), the Honorable Court stated that it had a concern for due process and then stated that most cases are solved by political process, not by law. The Petitioner protests and feels the Honorable Judge of the Superior Court is not expressing a wise view. The United States Constitution is the foundation of the law. The supreme law of the land, in Article VI, second sentence, granting judicial review is a check and balance. The correct view has been already expressed in Marbury v. Madison, 1 Granch 137 (1803) by this Court. Even the Court of Appeals and the Superior Court correctly declared the Constitution protection is absent. The Petitioner is still insisting judicial review is important to insure

domestic tranquility, to secure blessings of liberty to ourselves and our posterity as stated in the Preamble. In this instance case, the Superior Court of Wayne County, North Carolina, finds the actions of the building inspector is a governmental function. A governmental function must be delegated by Legislation. The Fourteenth Amendment, Section One , prohibited legislation to cut off water without due process of law. The Supreme Court of the United States, in 1885, dealt with monopolies under the Constitution. It invalidated the city charter in New Orleans v. Rivers, 29 L.Ed 525, 6 S.Ct 273 (1885). Ordinance law is comparable to a by-law. The use by a private corporation law for a broad claim of immunity shall not be allowed which was enunciated by this Court in Youngstown Sheetmetal and Tubing Co., el v. Sawyer, 343

US 579 (1952). This Court also stated that a violation of law or due process will subject the offending party to a civil action in Harlow v. Fitzgerald, 457 US 800 (1982).

The relation established in the supplying of water service is wholesaler and retailer. The Petitioner paid the assessment in full and all the additional charges associated therewith. The waterline on the Petitioner's property is absolutely at Petitioner's own cost; therefore, the Petitioner shall have the right to exclude the Respondents from cutting off at the Petitioner's property. Thus, the right to exclude from taking shall be retained and protected under the Fifth Amendment (Dolan v. City of Tigard, supra.).

Since the Respondents are a municipal corporation maintaining water for sale, it is liable to the Petitioner for damages and thus

the Motion for Summary Judgment should not have been granted.

Thus, the Respondents are liable under 42 USCS, 1983, City of Laudue et al v. Margaret P. Gilleo, 512 US - 129 LED 2nd 36, 114 sct.

When Chief Justice Stone, in United States v. Carolene Product Co., 304 US 144 (1938), insisted that requiring citizens to give up their constitutional protection is not reasonable, the Court shall be "concerned with power and not the merits of its exercise". Therefore, the lower courts in invalidating the United States Constitution and it's Laws (33 UCSC St. 1251 and 42 USCS 1983), was in error.

SUMMARY

Chief Justice Marshall, in Marbury v.

Madison, 1 Granch 137 (1803), expressed the view of judicial review. He argued that without judicial review, a written constitution would be quite futile as a means of limiting the abuse of government power. For that reason the government power need not deny the Petitioner equal protection under the law and the Constitution.

Under the doctrine of presumption of constitutionality of any written law, Justice Washington outlined in 1827 in Ogden v. Sounders, 12 Wheat 213, requiring Courts and other authorities to presume the legality of legislative principles. Respondent's actions violated the Petitioner's constitutional protection and its guarantees. The officials' conduct and actions are questioned in this controversy. The Petitioner presented this question to the Superior Court.

Unfortunately, the Court mistook this issue by insisting the city ordinance is constitutional and rejecting the Petitioner's claim.

There is no clean water protection law with requirements adopted and imposed in the Respondent's ordinance. Yet, even with 33 USCS 1251, the Petitioner received the above stated results. The Petitioner faced many unusual disappointments. The original questions presented never were heard properly per curiam as expressed in the view of New York Times Co. v. United States, 1971, 403, US 713. Therefore, the Petitioner requests this Honorable Court to invalidate the Respondents' conduct and actions, disregarding the Petitioner's Constitutional protection guaranteed to the people, for the right to pursue a daily livelihood, liberty and the security of property.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted this, the 6th day of May, 1996.

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